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5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE DISTRICT OF ARIZONA
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8 JUANITA B. DOMINGUEZ,)

9 Plaintiff,)

10 vs.)

11 BCW, Inc. a Delaware corporation doing)
12 business as SUNWARD MATERIALS, et)
13 als.,)

14 Defendants.)
15

No. 98-1002-PHX-ROS

ORDER

16 **INTRODUCTION**

17 Plaintiff filed a Complaint against her former employer, BCW, Inc., a Delaware corporation
18 doing business as Sunward Materials (“Sunward”), and Jerry Shipman,¹ a member of its
19 management (collectively “Defendants”), in the Maricopa Superior Court, alleging Title VII and
20 Equal Pay Act violations based on race and gender. On June 2, 1998 Defendant ² removed the
21 case to the district court, and on July 29, 1999, Defendant filed a Motion for Summary Judgment
22 and a Statement of Facts in Support of the Motion. On August 31, 1999, Plaintiff filed a
23 Response and a Controverting and Separate Statement of Facts. Defendant filed a Reply on
24 September 27, 1999. The parties stipulated to stay the discovery and a settlement conference until
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27 ¹ “Shipman” refers to Defendant Shipman. Jerry Shipman’s wife is also named as a
28 Defendant, apparently as a member of the marital community.

² “Defendant” refers to BCW, Inc. and/or Sunward Materials.

1 the Court rules on Defendant's Motion for Summary Judgment and the Court agreed by order
2 entered September 23, 1999.³

3 The resolution of the Motion for Summary Judgment focuses on one issue: whether
4 Plaintiff's claims are precluded by the Agreement and Release (the "Agreement") she signed at
5 the time of her termination from her employment with Defendant. Defendant alleges that it is
6 entitled to summary judgment, because "Plaintiff knowingly and voluntarily, as part of a severance
7 agreement, signed a full waiver and release, thus waiving her right to assert her claims against
8 Sunward." (Def.'s Mot. at 1.) Plaintiff disputes that she "knowingly and voluntarily gave up her
9 rights under Title VII and the Equal Pay Act" by signing the Agreement. (Pl.'s Mot. at 1.)

10 **FACTS**

11 **A. The undisputed facts**

12 The following facts are undisputed. Plaintiff is a woman of Mexican ancestry (Def.'s SOF
13 Exh. C) She has less than a high school education and attended a medical secretary course at a
14 community college in 1985 or 1986. (Pl.'s SOF ¶ 1.) Prior to commencing her employment with
15 Sunward, Plaintiff held two clerical positions in other companies, cleaned houses, worked as a
16 waitress and bartender, and was a cashier at a K-Mart store. Id. Plaintiff was hired by Sunward in
17 March of 1996 as an order taker in the cement department. (Def.'s SOF ¶ 1.) Plaintiff's title
18 eventually changed to "customer service representative" but her duties remained the same. (Def.'s
19 SOF ¶ 1.) As a customer service representative, Plaintiff questioned her supervisor, Shipman,
20 regarding why three people whom she was required to train were hired at a higher salary than she
21 was making. (Pl.'s SOF ¶ 4.) Shortly thereafter, in the beginning of October 1997, Plaintiff was
22 transferred to the aggregate department and started working as a dispatcher. (Def.'s SOF ¶ 2.)

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24 ³ The issues the parties raise are adequately addressed in their briefs. Accordingly, the
25 hearing which was set for February 25, 2000, was vacated. Lake at Las Vegas Investors Group,
26 Inc. v. Pacific Malibu Dev. Corp. 933 F.2d 724, 729 (9th Cir. 1991), cert. denied, 503 U.S. 920
27 (1992); and see United States v. Cheely, 814 F. Supp. 1430, 1436 n.4 (D. Alaska 1992) ("Lake
28 stands for the proposition that oral argument may be dispensed with in connection with dispositive
motions where the issues are fully presented in the written submissions."), aff'd, 36 F.3d 1429
(9th Cir. 1994).

1 On October 20 or 21, 1997, one of her supervisors, John Crisci, informed Plaintiff that she was
2 terminated as of October 20, 1997, (Pl.'s SOF ¶ 3), and gave her the Agreement and Release (the
3 "Agreement") to sign. (Pl.'s SOF ¶ 4.) John Crisci told Plaintiff that she was required to sign the
4 Agreement to receive severance pay. Id. Plaintiff was not represented by an attorney when she
5 was terminated. (Pl.'s SOF; Exh. 2 Aff. of Juanita Dominguez.) During Plaintiff's deposition,
6 when questioned whether the Agreement was explained to her, Plaintiff related she had the
7 following conversation with John Crisci when he gave her the Agreement:

8 A. He told me it was a severance pay. I asked him what a severance pay
9 was. He told me it was for the time I was there. And he explained how
10 they figured out the — I asked him how they figured out the severance
11 pay. I don't remember what he told me, but he told me how they figured
12 it out.

13 Q. Okay.

14 A. And I said, well, what's all the paperwork? He says, well, he have [sic]
15 — you have to sign to receive your severance — whatever — severance
16 pay. And I said, okay. And he goes, so if you're going to take us to court
17 or something. Well, it's a layoff. Why am I going to take you to court if
18 it's a layoff?? He says, well, this is an example I'm going to give you.
19 This I remember real clear because he says, well, you have 20 people 20
20 years and under, and we have 40 people — I mean 20 people 40 years and
21 over. He says, you have a layoff, and they take — and they get rid of the
22 40 — the 20 people that are older, you know, they have a case.

23 (Pl.'s Depo. at 37.) Plaintiff was given forty five days to return the Agreement. (Pl.'s SOF ¶7.)
24 Plaintiff was not represented by an attorney (Pl.'s SOF; Exh. 2 Affid. of Juanita Dominguez), but
25 she was neither encouraged nor discouraged from seeking the advice of an attorney. (Pl.'s Depo.
26 at 39.) Plaintiff took the document home, read it, signed it, and returned it sometime on or about
27 October 22, 1997. (Def.'s SOF ¶¶ 8-9.) Plaintiff returned the Agreement shortly after her
28 termination and received \$1,512.00 from Defendant as severance pay. (Def.'s SOF ¶ 9; Pl.'s
Depo. at 35.) Plaintiff had never been laid off from a job before, nor had she been involved in a
lawsuit, received severance pay, or been asked to sign a release of claims prior to her termination
by Defendant. (Pl.'s SOF ¶ 19.)

Several days after Plaintiff's termination, Defendant advertised in the Arizona Republic
for a dispatcher in the aggregate department. (Compl. ¶ 14; Answr. ¶ 14.) On November 19,
1997, Plaintiff filed a charge of discrimination based on race and gender with the Equal

1 Employment Opportunity Commission (“EEOC”), (Compl. ¶ 15), and on February 8, 1998, she
2 received a Right to Sue Letter. (Compl. ¶ 16.) On May 4, 1998, Plaintiff commenced this action.

3 **B. The Agreement**

4 The Agreement entered into between Plaintiff and Defendant consists of four pages with
5 small but legible print and provides in part:

6 Juanita Dominguez desires to release [BCW Inc.] from all claims and
7 causes of action, if any, she may have arising from or relating to her
8 employment or service or termination [by BCW Inc.]; and Juanita
9 Dominguez and BCW Inc. desire to establish their respective rights and
10 obligations for the future.

Now, therefore, for and in consideration of the following mutual
covenants and promises, and for other good and valuable consideration,
the receipt and sufficiency of which are hereby acknowledged, Juanita
Dominguez and BCW Inc. hereby agree:

11 1. Termination. Juanita Dominguez’s employment with [Defendant] will
12 terminate effective October 20, 1997. Juanita Dominguez acknowledges
13 and agrees that . . . BCW Inc. has agreed to pay her regular salary and
14 earned vacation to the date of termination . . . and that such payment is in
15 full satisfaction of all wages and vacation owed her by [her employer] to
16 the date of his [sic] termination.

2. Severance Payment/Benefits. **Severance Payment:** BCW Inc. agrees
to pay to Juanita Dominguez \$1,512.00 within fifteen (15) days of the
execution of this Agreement and Release provided that she has not
revoked this Agreement and Release. . . .

10. Release. Juanita Dominguez agrees to release, acquit and discharge
and does hereby release, acquit and discharge [her employer] from any
and all claims and from any and all causes of action against any of [her
employer-companies] of any kind or character, whether now known or
unknown, she may have against [her employer] including, but not limited
to, any claim for salary, benefits, expenses, costs, damages,
compensation, remuneration or wages; and all claims or causes of action
arising from her employment, termination of employment, or any alleged
discriminatory employment practices, including but not limited to any and
all claims or causes of action arising under the Age Discrimination in
Employment Act, as amended, 29 U.S.C. § 621, et seq. and any and all
claims or causes of action arising under any other federal, state or local
laws pertaining to discrimination in employment or equal employment
opportunity. This release also applies to any claims brought by any
person or agency or class action under which Juanita Dominguez may
have a right or benefit.

11. No Admissions. Juanita Dominguez expressly understands and agrees
that the terms of this Agreement and Release are contractual and not
merely recitals and that the agreements herein and consideration paid is
to compromise doubtful and disputed claims, avoid litigation, and buy
peace, and that no statement or consideration given shall be construed as
an admission of liability by BCW Inc. and such liability being expressly
denied. This Agreement and Release does not constitute evidence of
unlawful conduct or wrongdoing by BCW Inc.

1 12. Remedies. Juanita Dominguez and BCW Inc. agree that, because
2 damages at law for any breach or nonperformance of this Agreement and
3 Release by Juanita Dominguez, while recoverable, will be inadequate, this
4 Agreement and Release may be enforced in equity by specific
5 performance, injunction, accounting or otherwise.

6 13. Enforcement of Agreement and Release. No waiver or non-action
7 with respect to any breach by the other party of any provision of this
8 Agreement and Release, nor the waiver or nonfiction [sic] with respect to
9 any breach of the provisions of similar agreements with other employees
10 shall be construed to be a waiver of any succeeding breach of such
11 provision, or as a waiver of the provision itself. Should any provisions
12 hereof be held to be invalid or wholly or partially unenforceable, such
13 provisions shall be revised and reduced in scope so as to be valid and
14 enforceable.

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16 18. ADEA Rights. Juanita Dominguez acknowledges and agrees: (i) that
17 she has at least forty five days to review this Agreement and Release; (ii)
18 that she has been advised in writing to consult with an attorney regarding
19 the terms of this Agreement and Release prior to executing this
20 Agreement and Release; (iii) that, if she executes this Agreement and
21 Release, then she has seven days following the execution of this
22 Agreement and Release to revoke this Agreement and Release; (iv) that
23 this Agreement and Release shall not become effective or enforceable
24 until the revocation period has expired; (v) that she does not, by the terms
25 of this Agreement and Release, waive claims or rights that may arise after
26 the date she executes this Agreement and Release; (vi) that she is
27 receiving, pursuant to this Agreement and Release, consideration in
28 addition to anything of value to which she is already entitled;

(Def.'s SOF Exh. B; Pl.'s SOF Exh. 3.)

LEGAL DISCUSSION

A. Summary Judgment Standard

A motion for summary judgment may be granted if the evidence shows “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). Three factors must be considered in deciding a motion for summary judgment: (1) whether there is any dispute between the parties, (2) whether such dispute relates to the facts of the case, and (3) whether the factual dispute is material to the disposition of the case. The initial burden of identifying the elements of the claim in the pleadings, depositions, answers to interrogatories, affidavits, and other evidence, which the moving party “believes demonstrates the absence of a genuine issue of material fact,” is on the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

1 To defeat the motion, the non-moving party must show that there are genuine factual
2 issues “that properly can be resolved only by a finder of fact because they may reasonably be
3 resolved in favor of either party.” Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). If at
4 trial the non-moving party will bear the burden of proof as to any essential element of its case, that
5 party can withstand a motion for summary judgment only by demonstrating that a genuine issue of
6 fact pertaining to such material element exists and that the dispute may be resolved only by the
7 fact finder, because it might reasonably be resolved in favor of either party. Celotex, 477 U.S. at
8 321. Courts must view the evidence in the light most favorable to the non-moving party and draw
9 any reasonable inferences in the non-moving party’s favor. Warren v. City of Carlsbad, 58 F.3d
10 439, 441 (9th Cir. 1995). Bare conclusory allegations unsupported by factual data, however, are
11 insufficient to defeat a summary judgment motion. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.
12 1989). Therefore, in the case at bar, the Court must decide whether there exists any disputed issue
13 of material fact regarding whether the Agreement executed by the parties released Plaintiff’s
14 possible claims against Defendant for gender and race discrimination under Title VII, 42 U.S.C. §
15 2000e, et seq. and the Equal Pay Act, 29 U.S.C. § 206(a).

16 **B. What Constitutes a Valid Waiver of Claims Arising from Employment.**

17 Where the rights of the litigants derive from a federal statute, federal law governs.
18 Stroman v. West Coast Grocery Co., 884 F.2d 458, 459 (9th Cir. 1989), cert. denied, 498 U.S. 854
19 (1990); Hisel v. Upchurch, 797 F. Supp. 1509, 1517 (D. Ariz. 1992) (quoting Jones v. Taber, 648
20 F.2d 1201, 1203 (9th Cir. 1981): “conditions affecting the validity of a release of significant
21 federal rights are eminently a matter of federal law[]”). It is well established that to constitute a
22 valid waiver, the release of claims must be voluntary, deliberate and informed. Stroman, 884 F.2d
23 at 462 (citations omitted). See Overmeyer Co. v. Frick Co., 405 U.S. 174 (1972), and Fuentes v.
24 Shevin, 407 U.S. 67, 94-96 (1972) (holding that the contractual waiver of any rights is valid only
25 when the disclaiming party waived and released her rights of her own free will, fully understanding
26 the consequences of the waiver).

27 Stroman is cited by both Plaintiff and Defendant in support of their respective positions.
28 In that case, the plaintiff brought a Title VII action alleging race discrimination. Prior to

1 commencing the suit, the plaintiff repeatedly asked his employer to be trained for a warehouse
2 supervisor's position, was interviewed and denied the training on all occasions. Stroman, 884 F.2d
3 at 460. Subsequently, he filed a discrimination charge with the Washington State Human Rights
4 Commission and with the EEOC. Id. Thereafter he filed another charge alleging retaliation for
5 the first charge and one month later applied again for the position of supervisor but did not obtain
6 it. Id. Later during the same year, the plaintiff asked to be placed on economic layoff in order
7 to collect unemployment benefits. Id. The employer agreed subject to plaintiff signing a release
8 agreement, which contained six simple sentences and provided that the agreement "represent[ed]
9 a full and final settlement of any and all claims arising out of [plaintiff]'s employment with [the
10 defendant]." Id. The Ninth Circuit held that the suit was barred by the terms of a release agreement
11 entered into by plaintiff and defendant,⁴ id. at 459. and summarized the legal standard as follows:
12 "[t]he determination of whether a waiver of Title VII [claims] was voluntary, deliberate and
13 informed is predicated upon an evaluation of several indicia arising from the circumstances and
14 conditions under which the release was executed." Id. at 462 (internal quotation marks and citation
15 omitted). Relying on cases from other jurisdictions Stroman adopted the following criteria: 1)
16 whether the release is voluntary depends on objective and subjective factors; 2) of primary
17 importance is clarity and lack of ambiguity in the agreement; 3) also important is plaintiff's
18 education and business experience; 4) whether there was a non-coercive atmosphere surrounding
19 the execution of the agreement; and 5) whether the employee had the benefit of legal counsel. Id.
20 at 462 (citations omitted). Under Stroman, whether a release is voluntary, deliberate and informed
21 is a factual inquiry which must be determined on a case by case basis considering the totality of
22 the circumstances surrounding the execution of the release. Id. Further, a valid release must be
23 supported by consideration, i.e., something to which a party signing the release does not have an
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26 ⁴ The dissent in Stroman agreed that "the economic layoff agreement was sufficient to
27 waive Stroman's Title VII claims[.]" but disagreed that Stroman's waiver was knowing and
28 voluntary, finding that the record did not "permit[] only one conclusion of this matter." 884 F.2d
at 463 (Tang, J., dissenting).

absolute right already. Salmeron v. United States, 724 F.2d 1357, 1362 (9th Cir. 1983) (citations omitted).⁵

C. Whether Plaintiff's Execution of the Agreement was Voluntary, Deliberate, and Informed.

Plaintiff alleges she did not understand that by signing the Agreement she was giving away her right to pursue claims under Title VII and the Equal Pay Act, but rather understood that she needed to sign the Agreement in order to receive her last paycheck. Defendant alleges that the Agreement was explained to Plaintiff by John Crisci.

1. Was the language and the structure of the Agreement clear and unambiguous.

Under Stroman, the inquiry begins with a determination of whether the Agreement is clear and unambiguous. The first provision of the Agreement ("Section 1") addresses the payment of the last paycheck. Plaintiff was entitled to her last paycheck whether or not she signed the Agreement, but this is not clear from the language of the Agreement. Defendant does not allege that this was explained to Plaintiff. Section 1 states that Defendant "has agreed to pay [Plaintiff] regular salary and earned vacation to the date of termination . . . and that such payment is in full satisfaction of all wages and vacation owed her by [Defendant] to the date of his [sic] termination." (Def.'s SOF Exh. B) (emphasis added). Placing this section in the beginning of the Agreement emphasizes this provision. Further, placing this section in the Agreement may have been misleading because it suggests that the final paycheck is a benefit of the Agreement rather than a payment to which Plaintiff was entitled regardless of the Agreement. Whether it was is for a fact finder to decide.

The next provision of the Agreement ("Section 2"), setting forth the amount of the severance pay, does not explain that the severance is offered in exchange for Plaintiff's waiver of statutory rights to pursue potential legal claims. Nor is the waiver explained at any point close to Section 2 where the severance is set out. Rather, a single sentence and exceedingly verbose Section 10 of the Agreement, which lists the causes of action purported to be released, comes two pages and

⁵ This element of the validity analysis is not relevant in the case at bar, because there are no allegations of insufficient consideration.

1 eight sections later. Its location within the structure of the Agreement and the sheer length of the
2 sentence make it difficult to follow in the context of the entire document.

3 The lack of clarity resulting from its verbosity is not limited to Section 10. Other previously
4 quoted sections of the Agreement are also not written clearly. Like Section 10, they are lengthy
5 and contain legal terms which may be incomprehensible to a person without legal education. For
6 example, Section 12 reads: “ Remedies. Juanita Dominguez and BCW Inc. agree that, because
7 damages at law for any breach or nonperformance of this Agreement and Release by Juanita
8 Dominguez, while recoverable, will be inadequate, this Agreement and Release may be enforced
9 in equity by specific performance, injunction, accounting or otherwise.” Whether a lay person can
10 be reasonably expected to understand the meaning of Section 12 is a fact question. Similarly,
11 Section 13 also includes legal terminology:

12 Enforcement of Agreement and Release. No waiver or non-action with respect
13 to any breach by the other party of any provision of this Agreement and
14 Release, nor the waiver or nonfiction [sic] with respect to any breach of the
15 provisions of similar agreements with other employees shall be construed to
16 be a waiver of any succeeding breach of such provision, or as a waiver of the
provision itself. Should any provisions hereof be held to be invalid or wholly
or partially unenforceable, such provisions shall be revised and reduced in
scope so as to be valid and enforceable.

17 (Def.’s SOF Exh B) (emphasis added). A jury may reasonably find that Section 13 is particularly
18 obtuse to a person of Plaintiff’s experience and education. Further, in the case at bar, the
19 Agreement extends over four pages in small print. In contrast, in Stroman, the release agreement
20 consisted of only six points, each containing one comprehensible short sentence.

21 Also, the explanation of the reason for the severance pay, provided by John Crisci to Plaintiff
22 as set forth in her deposition,⁶ gives only one, perhaps unintelligible, example of what claims were
23 contemplated by the Agreement, that of age discrimination. Mr. Crisci did not explain to Plaintiff
24 that she would be giving up other possible statutory rights, nor did he advise her that she was
25 entitled to her last paycheck even if she decided not to sign the Agreement. Plaintiff questioned
26 her supervisor in the matter of equal pay prior to her termination. (Pl.’s SOF ¶ 4.) Defendant,

27 ⁶ Defendant does not controvert Plaintiff’s report of the meeting with John Crisci
28 provided by her under oath during her deposition.

1 therefore, was aware of at least one potential claim that Plaintiff could possibly bring. If
2 Defendant had specifically provided Plaintiff with an explanation that by signing the Agreement
3 she was releasing any possible claim related to complaints of unequal pay, Plaintiff could not
4 assert that her release was uninformed. This, however, did not occur.

5 Although listing potential causes of action in Section 10 provides sufficient clarity of what
6 claims are waived in general terms, ensconcing this section in the lengthy Agreement preceded
7 and followed by many legal and possibly ambiguous provisions may have detracted from the clarity
8 of the document. This is also for the jury to decide.

9 2. Plaintiff's education and business experience.

10 In contrast to the plaintiff in Stroman, Plaintiff in the instant case does not have a college
11 degree. She did not graduate from high school, having left before completion of the eleventh
12 grade, nor did she earn an equivalency diploma. (Pl.'s Resp. at 4.) Defendant alleges that
13 Plaintiff's assertions regarding her lack of education and sophistication are "in stark contrast to
14 the manner in which she has portrayed herself throughout this lawsuit--i.e. as a model employee
15 who diligently and competently performed her job." (Def.'s Rpl. at 3 n.2.) Her portrayal is a fact
16 question for the jury to decide. Moreover, Plaintiff's lack of education or sophistication are not
17 inconsistent with a diligent job performance. She did not hold a position requiring a college
18 degree. Although she occasionally was asked to interpret Spanish for various departments of
19 Defendant, whether these facts establish sufficient ability to understand the waiver is a jury
20 question. The jury may conclude that Plaintiff was very diligent in performing her job related tasks
21 and yet lacked sufficient education and experience to fully appreciate the legal ramifications of
22 the Agreement she signed.

23 3. Whether Plaintiff had an opportunity to consult an attorney.

24 It is undisputed that Plaintiff did not consult with an attorney, though she had sufficient
25 opportunity to consult with one. Plaintiff argues, however, that she did not understand why she
26 needed an attorney. Moreover, she states she could not afford an attorney, which, if true, makes
27 an opportunity to consult with one meaningless. Further, as discussed previously, because she
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1 thought she would not receive her last paycheck unless she signed the Agreement, she signed it
2 and returned it promptly because she needed her paycheck.

3 4. Whether a non-coercive atmosphere surrounded the execution of the Agreement.

4 Plaintiff does not allege that Defendant pressured her to sign the Agreement and nothing
5 in the record before the Court explicitly indicates that any coercion was attempted. However, a
6 coercive environment may be created by implication when, as discussed above, Plaintiff thought
7 that she would not get her last paycheck, unless she signed the Agreement. Whether coercive
8 environment existed is for the jury to decide.

9 5. Totality of the Circumstances.

10 Applying the Stroman test to the undisputed facts of the case at bar, the Court concludes
11 that Defendant is not entitled to summary judgment, because the record before the Court does not
12 demonstrate as a matter of law that Plaintiff's signing of the Agreement constituted a voluntary,
13 deliberate, and informed release. Stroman, 884 F.2d at 462. There are material issues of fact to
14 be resolved by the jury regarding waiver.⁷ Defendant's Motion for Summary Judgment will be
15 denied.

16 Accordingly,

17 **IT IS ORDERED** that the hearing set for February 25, 2000 is vacated.

18 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment (Doc. #
19 28) is denied.

20 **IT IS FURTHER ORDERED** that the stay of discovery is vacated.

21 **IT IS FURTHER ORDERED** that the parties contact Magistrate Judge Verkamp for
22 scheduling the settlement conference.

23 DATED this ____ day of March, 2000.

26 ⁷ The parties also dispute whether Defendant's advertising for a new dispatcher
27 constituted an attempt to replace Plaintiff or to hire a better qualified employee. This dispute is
28 not material to the resolution of whether Plaintiff's signing of the Agreement was voluntary,
deliberate, and informed.

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Cc. All counsel of record.

Roslyn O. Silver
United States District Judge